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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No.

REFRACTARIOS MONTERREY, S.A.,

Petitioner,

vs.

FERRO CORPORATION and U.S. INTERNATIONAL TRADE COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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In The

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered in the above entitled case on October 11, 1979.

OPINIONS BELOW

The judgment and opinion of the United States Court of Customs and Patent Appeals appears in Appendix I hereto.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on October 11, 1979. This petition is filed within 90 days of that date pursuant to 19 U.S.C. §2101(c). The Court's jurisdiction is invoked under 29 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are 19 U.S.C. §1337; 5 U.S.C. c. 5, Subch. II; 19 C.F.R. §210.30(d) which are reprinted in Appendix II.

QUESTIONS PRESENTED

Whether the Court of Customs and Patent Appeals ("CCPA") has correctly decided that it does not have jurisdiction to consider petitioner's appeal from a decision of the United States International Trade Commission ("ITC") refusing to declassify documents designated as business confidential pursuant to a protective order issued by an ITC Administrative Law Judge pursuant to ITC Rules and Regulations.

STATEMENT OF THE CASE

Respondent, Ferro Corporation, instituted a proceeding against petitioner, Refractarios Monterrey, S.A., in the United States International Trade Commission under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. §1337 (herein "Section 337"), on February 3, 1978, alleging that petitioner engaged in unfair methods of competition and unfair acts in the importation into or sale in the United States of certain ceramic tile setters. Respondent[1] claimed to have a valid U.S. patent

1. In the original ITC proceeding, Dallas Ceramic Company was also named as a party. For purposes of this petition, when the word "petitioner" is used herein, it refers solely to Refractarios Monterrey, S.A. When the word "respondent" is used, it refers solely to respondent Ferro Corporation. Respondent ITC will be referred to as "the ITC".

covering the design of such tile setters and alleged that petitioner's imported goods infringed this patent. The ITC instituted a formal investigation on February 10, 1978. The notice of investigation set out six possible issues to be covered in the investigation. However, in its prehearing statement, respondent failed to include any allegations as to five of the items listed in the notice of investigation. The Commission Presiding Officer (the "Administrative Law Judge") ordered that these allegations be deemed abandoned. The only remaining item alleged a violation of claims 1, 4, 6, 7 and 8 of U.S. Letters Patent 3,169,295. On June 15, 1978, respondent filed with the U.S. Patent and Trademark Office ("PTO") a disclaimer under 35 U.S.C. §253 disclaiming claims 1, 4, 6, 7 and 8 of the patent in question and also filed for reissue of its patent based on narrower claims. Petitioner, in turn, filed a motion to terminate the ITC investigation, which was granted on September 11, 1978.

Prior to the granting of this termination, petitioner moved that the Commission Administrative Law Judge declassify certain exhibits and depositions that were designated as business confidential by respondent pursuant to a protective order issued by the Administrative Law Judge. The protective order was issued under the authority of the Commission's Rules and Regulations contained in 19 C.F.R. §210.30(d). The complete text of the protective order is set out in Appendix III.

The protective order prohibited the disclosure of confidential information to persons not specifically designated and provided for confidential treatment in accordance with 5 U.S.C. §552(b)(4) and 18 U.S.C. §1905:

> "subject to a challenge by any party pursuant to paragraph 10 below or to a *final* ruling, after notice, by the Commission, its designated presiding officer, or its Freedom of Information

Act Officer to the contrary, *or by appeal of such ruling, interlocutory or otherwise.*"[2] (emphasis supplied).

Paragraph 10 of the protective order provides in part that:

> ". . . if the recipient and supplier are unable to concur upon the status of the subject information submitted as confidential business information, within ten days from the date of notification of such disagreement, any party to this order may raise the issue of the designation of such a status to the Commission or its designated presiding officer who shall consider the issue."[3]

The protective order further provides in paragraph 13 that:

> "Nothing in this order shall abridge the right of any person to seek *judicial review* or to pursue other appropriate judicial action with respect to any ruling made by the Commission, its Freedom of Information Act Officer, or its designated presiding officer concerning the issue of the status of confidential business information."[4] (emphasis supplied).

The parties agreed to declassify certain materials but could not reach agreement on others. On September 1, 1978, petitioner filed a supplemental motion seeking declassification of documents upon which agreement could not be reached. This motion was denied by the Administrative Law Judge on

2. Protective Order, Appendix III, paragraph 8.

3. *Id.* at paragraph 10.

4. *Id.* at paragraph 13.

September 27, 1978. On October 6, 1978, petitioner filed a motion requesting that the Administrative Law Judge reconsider his decision of September 27, 1978. This motion was denied on January 12, 1979. Petitioner then filed an appeal from the order of the Administrative Law Judge with the ITC on January 24, 1979. On March 6, 1979, the Commission issued a decision "not to review the presiding officer's order . . . denying [the] motion to declassify certain materials subject to protective order." On March 23, 1979, petitioner filed a petition for reconsideration with the Commission. This petition for reconsideration was based in part on newly discovered evidence in the record of the PTO reissue proceeding. In documents filed with the PTO, respondent stated that:

> "Applicant hereby makes the entire proceeding before the ITC of record herein . . ."[5]

It was furthermore stated that petitioner (respondent below):

> "is invited to join the examination by pointing out specific passages of the record in the ITC investigation which applicant may have overlooked, for purposes of rapidly advancing the examination hereof."[6]

On May 1, 1979, the ITC denied the petition for reconsideration. On May 10, 1979, petitioner filed a notice of appeal and assignment of error with the CCPA based on the ITC's refusal to review the Presiding Officer's order which denied petitioner's motion to declassify.

On May 22, 1979, respondent filed a motion to dismiss petitioner's appeal. Respondent stated two grounds for its motion — first, that the CCPA did not have jurisdiction to hear

5. Exhibit A to Petition for Reconsideration, March 23, 1979 at 3.

6. *Id.* at 8-9.

the appeal and second, that the appeal was untimely since it was filed more than 60 days from the date the Administrative Law Judge denied petitioner's motion for reconsideration (*i.e.*, January 12, 1979). Respondent argued that it did not consider the date that the ITC rejected petitioner's petition for reconsideration (*i.e.*, May 1, 1979) as the final determination of this matter. On June 1, 1979, petitioner filed an opposition to respondent's motion to dismiss, pointing out that Section 337 refers to appeals from final determinations "of the Commission", not the Administrative Law Judge; that its appeal was timely; and that the CCPA did have jurisdiction based on a liberal interpretation of the language of §337, when §337 is read *in pari materia* with the Administrative Procedure Act ("APA"). On June 25, 1979, respondent filed a reply to petitioner's opposition. No reply or opposition was filed by the ITC at that time. On the same day, June 25, 1979, the ITC filed a new and separate motion to dismiss. Petitioner replied to this motion on July 6, 1979. On October 11, 1979, the CCPA dismissed petitioner's appeal stating that the court did not have subject matter jurisdiction because no "final determination" within the meaning of the statute existed and therefore "this court is without authority to review the matters in question."[7]

7. Appendix I at 15

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS HAS JURISDICTION TO HEAR PETITIONER'S APPEAL FROM AN ADVERSE RULING OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION UNDER SECTION 337, WHERE SUCH RULING IS FINAL AND AFFECTS THE SUBSTANTIVE RIGHTS OF THE PARTIES.

Petitioner believes that a writ of certiorari to the Court of Customs and Patent Appeals is required in this case because the CCPA has taken an overly narrow and incorrect view of its own jurisdiction to hear appeals from the ITC in cases under Section 337. Sections 333 and 335 of the Tariff Act of 1930, as amended (19 U.S.C. §1333, §1335) authorize the ITC to adopt rules and regulations. 19 C.F.R. §210.30(d) provides for the issuance of protective orders in cases under Section 337 of the Tariff Act of 1930 (19 U.S.C. §1337) "for the protection of the public interest". Pursuant to those rules, a protective order was issued in the instant case to protect business confidential data.

When it appeared that respondent's patent based claim against petitioner before the ITC was not viable due to the possible invalidity of its patent, respondent chose to file a disclaimer with the Patent and Trademark Office and to seek reissue of its patent. As a result of these acts by respondent, the ITC investigation was terminated on motion by petitioner. Although this termination disposed of the case, it did not finally determine all issues relative to the confidentiality of documents.

Under the provisions of the protective order, specific procedures were established for classifying and declassifying materials after termination of an ITC investigation. The protective order specifically provided for an appeals procedure

to the Commission[8] to contest the confidential status of documents covered under the protective order and for appeals from the Commission's rulings "interlocutory or otherwise." Review procedures are also provided for in paragraph 10 of the protective order, and referred to in paragraph 13 as well.[9]

The question then is whether the CCPA is authorized to hear such an appeal. The ITC suggested in its motion to dismiss filed with the CCPA that petitioner's remedy lies under the Freedom of Information Act. However, this disregards the review process established under the protective order and would require petitioner to begin its pursuit of declassification *ab initio* by the filing of a Freedom of Information Act request, pursuing administrative appeals and then eventually seeking review in the U.S. District Court. Firstly, such a process would be extremely burdensome and repetitive since a lengthy record has already been established in this case through petitioner's motions for declassification and reconsideration. Secondly, such a procedure is an incorrect use of the Freedom of Information Act which is designed to allow the general public to have access to agency records. This Court has held that the Freedom of Information Act was not intended for use by private litigants in judicial proceedings but to inform the public. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 150 (1975).

8. Protective Order, Appendix III, paragraph 8.

9. *Id.* at paragraphs 10 and 13.

II.

THE RULING BY THE CCPA THAT IT HAS NO JURISDICTION IN THIS CASE IS BASED ON AN OVERLY NARROW READING OF §337 AND IS INCONSISTENT WITH PAST CCPA DECISIONS.

A. The decision appealed from is a final determination.

Although Section 337(c) speaks of final determinations under subsections (d) and (e) of the Act for purposes of appeal, there is nothing in the language of the statute or the legislative history that indicates that determinations under subsections (d) and (e) are the only types of final determinations in a Section 337 proceeding. Petitioner followed the ITC rules and procedures carefully and pursued all available remedies until it obtained a final determination on the issue of declassification from the ITC. Therefore, the appeal to the CCPA was in no manner interlocutory, there being no other outstanding issues to be decided by the ITC.

There can be finality at different stages of a proceeding with several final rulings in the same proceeding on different aspects of the case. The D.C. Circuit has pointed out in *Environmental Defense Fund, Inc. v. Ruckelshaus,* 439 F.2d 584 (D.C. Cir. 1971), that:

> "The test of finality for the purposes of review is not whether the order is the last administrative order contemplated by the statutory scheme, but rather whether it imposes an obligation or denies a right with consequences sufficient to warrant review." *Id.* at 589, fn. 8.

The court noted further that:

> "A threat of economic injury has always been

regarded as sufficient, however, for the purpose of finding an order reviewable." *Id.* at 592.

Petitioner, although no longer litigating the merits of this case before the ITC, is very much involved in litigating matters relating to the patent in question before the PTO. Despite respondent's statement to the PTO that the entire ITC record is made available to the PTO,[10] respondent has refused to permit declassification of documents before the ITC that petitioner wishes to introduce before the PTO.

The refusal to declassify is in fact a final determination of the ITC and should be subject to CCPA review. Congress might not have anticipated, in drafting Section 337, that there might be other final determinations under that statute other than those under subsections (d) and (e), however, this Court has ruled that a statutory prohibition of judicial review will not be implied and will be found only upon a showing of "clear and convincing evidence" of legislative intent to prohibit review. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967).

The CCPA itself has previously taken a broad view of its reviewing powers. Although Section 337 only speaks of a final determination under subsections (d) or (e),[11] the CCPA in *Import Motors Ltd. v. U.S. International Trade Commission,* 530 F.2d 940 (1976), nevertheless concluded that it could review decisions under Section 337(f)[12] and that, despite the absence of any reference in the statute, these decisions were reviewable. The CCPA viewed Congress' failure to include §337(f) as "legislative inadvertence".[13] By so ruling, the CCPA has apparently

10. Footnote 5, *supra.*

11. These sections deal with exclusion orders.

12. This section deals with cease and desist orders.

13. 530 F.2d 940 at 944, fn. 9.

determined that it has the power to interpret Section 337 so as to include within the scope of its appellate review sections of the statute not specifically provided for by Congress.

Petitioner believes that this is another appropriate situation for a liberal interpretation of Section 337. The issue of declassification of documents submitted to the Commission and covered by a protective order involves an important substantive right. Petitioner requires this information in order to oppose effectively respondent's reissue application in the Patent Office proceeding.[14] Since Congress could not have anticipated every situation in which review of a final ITC decision would be desirable, the CCPA should permit such review whenever an issue affecting important rights of the parties is finally determined by the Commission. Although, as in *Import Motors, supra,* there is no express statutory authorization, there is also no statutory prohibition, and the presumption is in favor of appellate review. *Abbott Laboratories v. Gardner, supra.*

B. Petitioner should be entitled as a matter of public policy to the same review afforded parties in other administrative proceedings.

Section 337(c) incorporates by reference Title V, Chapter 5, Subchapter II of the United States Code which is a portion of the Administrative Procedure Act governing the conduct of administrative hearings. It is undisputed that this section requires the ITC to conduct its hearings under Section 337 "in conformity with the provisions" of the APA.[15] The language

14. Although any decision of the PTO on the reissue question would be reviewable by the CCPA, the issue of whether the PTO should have had certain classified documents from the ITC before it in reaching its decision on the reissue application would not be reached. Thus, substantial aspects of the case may ultimately come before the CCPA without a complete record. This is further justification on policy grounds for the CCPA to exercise jurisdiction at this time over the declassification question.

15. 19 U.S.C. §1337(c).

incorporating the APA comes in the same subsection and immediately preceding the language permitting appeals to the CCPA. The language and structure of Section 337(c) indicates that Congress, in creating a full scale APA hearing under Section 337, intended these proceedings to be treated the same as administrative proceedings in other federal agencies, except that appeals would go to the CCPA rather than the United States courts of appeals.

As noted by the CCPA in its opinion below, the judicial review procedures contained in Chapter 7 of the APA are not specifically mentioned in Section 337. However, the absence of such specific reference does not necessarily indicate that Congress intended litigants before the ITC in Section 337 cases to have lesser rights than parties to proceedings in other agencies. In fact, Congress may have presumed that by incorporating the procedures relating to the conduct of hearings under Chapter 5 of the APA, parties would have the full panoply of rights under other sections of the APA as well. It is certainly as valid a presumption as that made by the CCPA in *Import Motors, supra,* where an entire subsection of §337 was read into the section relating to judicial review predicated upon the alleged inadvertent omission of this section by the Congress. Section 704 of the APA (5 U.S.C. §704) provides for appellate review of "final action for which there is no other adequate remedy." We believe this section must be read *in pari materia* with Section 337(c).

It is not our position, as suggested by the ITC below, that the APA creates an implied grant of subject matter jurisdiction where it does not otherwise exist. Petitioner is aware of this Court's ruling in *Califano v. Sanders,* 130 U.S. 99, 107 (1977) which limited the appellate powers of the courts to review cases based on the APA without independent statutory authorization. However, this is not a case where no statutory appeals procedure exists and where petitioner relies solely on the APA. Rather, an appeal to the CCPA was created by Congress, and petitioner

urges only that, in entertaining this appeal under §337(c), the CCPA is required to consider the incorporation by reference of the APA in §337(c) and grant the same broad remedial review as would be given by the United States courts of appeals under Chapter 7 of the APA. This includes the right to "compel agency action unlawfully withheld or unreasonably delayed. . ." under §706(1) [5 U.S.C. §706(1)].

Even the decision in *Califano v. Sanders, supra,* is consistent with this position. That case limited the right to judicial review based solely on the APA. However, the reason for this limitation was not based on a desire on the part of this Court to limit judicial review of administrative proceedings. On the contrary, the Court decided that recent congressional amendments to 28 U.S.C. §1331(a) had expanded federal jurisdiction to review administrative proceedings and that it was unnecessary to rely solely on the APA. This Court observed in *Califano v. Sanders, supra,* that:

> "The obvious effect of this modification, subject only to preclusion of review statutes created or retained by Congress is to confer jurisdiction on Federal courts to review agency actions regardless of whether the APA of its own force may serve as a jurisdictional predicate." *Id.* at 105.

CONCLUSION

The decision of the CCPA in dismissing this appeal raises substantial questions concerning the right to judicial review of decisions of the United States International Trade Commission. The CCPA decision is inconsistent with recent decisions of this Court indicating a policy in favor of broad appellate review of administrative actions. Moreover, it is important that the Supreme Court determine whether parties to administrative hearings before the ITC, which are conducted under the APA (as that statute is incorporated by reference in §337), should be entitled to the same quality and scope of judicial review before the CCPA as other litigants receive from the United States courts of appeals' review of APA proceedings in other agencies.

For the foregoing reasons, petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX I — OPINION OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Appeal No. 79-22

REFRACTARIOS MONTERREY, S.A.,

Appellant,

v.

FERRO CORPORATION and U.S. INTERNATIONAL TRADE COMMISSION,

Appellees.

Decided: October 11, 1979

Before MARKEY, Chief Judge, RICH, BALDWIN and MILLER, Associate Judges.

BALDWIN, Judge.

This matter comes before the court on motions to dismiss by appellee, Ferro Corporation ("Ferro"), and appellee, the U.S. International Trade Commission ("ITC" or "Commission").

These motions urge that the court lacks jurisdiction to hear this appeal. The appeal is from the Commission's refusal to review the Administrative Law Judge's order that certain evidentiary matters in Investigation 337-TA-41 are to remain confidential under a protective order, i.e., denying appellant's Motion to Declassify. The investigation itself was terminated upon statutory disclaimer of all patent claims in suit by Ferro, the complainant below. The complaint instigating the action before the ITC alleged, *inter alia,* that certain imported articles infringed a valid U.S. patent owned by Ferro.

Appendix 1 - Opinion

Proceedings Below

On the basis of a complaint filed by Ferro pursuant to 19 USC 1337,[1] the ITC instituted, on February 3, 1978, an

1. The pertinent portions of 19 USC 1337 provide:

§1337. Unfair practices in import trade — Unfair methods of competition declared unlawful

(a) Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

Investigation of violations by Commission; time limits

(b)(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation. The Commission shall publish in the Federal Register its reasons for designating any investigation as a more complicated investigation. For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

(Cont'd)

Appendix 1 - Opinion

(Cont'd)

* * *

Determinations; review

(c) The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of Title 5. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d) or (e) of this section may appeal such determination to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court.

Exclusion of articles from entry

(d) If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

Exclusion of articles from entry during investigation except under bond

(Cont'd)

investigation of alleged unfair methods of competition and unfair acts in the importation into or sale in the United States of certain ceramic tile setters. Tile setters are relatively simple box-shaped devices used to support flat ceramic tiles during firing in a kiln. The Commission's Notice of Investigation[2] stated that an investigation was being instituted to determine whether there was a violation of §1337 in the unauthorized importation of certain ceramic tile setters into the United States, or in their subsequent sale, by reason of:

(1) the alleged coverage of such tile setters by claims 1, 4, 6, 7 and 8 of U.S. Letters Patent 3,169,295,

(2) the alleged unfair use of complainant Ferro's trade secrets and know-how,

(Cont'd)

(e) If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.

2. Published at 43 Fed. Reg. 5901 (February 10, 1978).

(3) the alleged charging of discriminatory and/or unfairly low prices for such tile setters with the intent to destroy or injure competition,

(4) an alleged conspiracy to charge discriminatory and/or unfairly low prices for such tile setters,

(5) an alleged attempt and intent to monopolize the U.S. market for such tile setters, and

(6) an alleged conspiracy to monopolize the U.S. market for such tile setters,

the effect or tendency of which unfair acts or methods of competition was to destroy or substantially injure an efficiently and economically operated U.S. industry or to restrain or monopolize trade and commerce in the United States.

On May 23, 1978, the Administrative Law Judge, in an Order for Prehearing Statements, directed the parties to submit statements of the issues to be considered at the hearing. Any contentions not set forth in detail were to be deemed abandoned, uncontroverted or withdrawn. Ferro's prehearing statement omitted any reference to the alleged anticompetitive acts (2) through (6), thus effectively removing those alleged acts from consideration.

Thereafter on June 15, 1978, Ferro filed with the U.S. Patent and Trademark Office (PTO) a disclaimer under 35 USC 253[3] disclaiming claims 1, 4, 6, 7 and 8 of the patent in

3. 35 USC 253 provides:

Whenever, without any deceptive intention, a claim of a patent is invalid the remaining claims shall not thereby be rendered invalid. A patentee, whether of the whole or any

(Cont'd)

question.[4] Patent infringement was therefore removed as an issue in the investigation.

Accordingly, on September 11, 1978, the Commission terminated its investigation based on a finding that none of the six unfair acts or unfair methods of competition found in the notice of investigation remained to be adjudicated.

However, about a month prior to the termination of the investigation, Refractarios Monterrey, S.A. (appellant here, respondent below) and its co-respondent, Dallas Ceramic Tile Co., filed a motion with the presiding Commission Administrative Law Judge seeking the declassification of certain depositions and related exhibits. During the discovery period, these materials had been classified as confidential commercial

(Cont'd)

> sectional interest therein, may, on payment of the fee required by law, make disclaimer of any complete claim, stating therein the extent of his interest in such patent. Such disclaimer shall be in writing and recorded in the Patent and Trademark Office; and it shall thereafter be considered as part of the original patent to the extent of the interest possessed by the disclaimant and by those claiming under him.
>
> In like manner any patentee or applicant may disclaim or dedicate to the public the entire term, or any terminal part of the term, of the patent granted or to be granted.

4. Ferro indicates in its Motion to Dismiss that "through inadvertence, some of its own tile setters, designed for a different purpose, may have been encompassed" by the noted claims. Ferro further states that "[u]pon such discovery, Ferro filed a formal disclaimer of all * * * claims involved in the ITC investigation, and promptly filed a reissue application on June 7, 1978, for narrower claims, in the United States Patent and Trademark Office, which application is still pending."

information subject to a protective order.[5] After agreement between the parties that some material would be declassified, appellant filed a motion seeking the declassification of additional documents.

On September 27, 1978 (after the termination of the investigation), the Administrative Law Judge issued an order denying appellant's motion to declassify. On October 6, 1978, appellant filed a motion for reconsideration which was subsequently denied on January 12, 1979. Appellant then filed, with the Commission's Secretary, a paper denominated "Appeal of Order of Presiding Officer Denying Motion to Declassify." The Commission informed appellant of its decision "not to review the presiding officer's order * * * denying [the] motion to declassify" on March 6, 1979. This letter additionally took note of appellant's right to seek release of the materials in dispute under the Freedom of Information Act. On March 23, 1979, appellant filed a "Petition for Reconsideration" of the Commission's decision not to review the Administrative Law Judge's order. The Commission again declined to review the order. The appeal to this court was filed on May 10, 1979, and seeks only review of the Commission's refusal to review the order denying declassification. No review is sought of the Commission's order terminating the investigation.

Ferro's Motion to Dismiss

Ferro mounts a two-pronged argument in its Motion. First, Ferro observes that §1337(c) provides that any person adversely effected by a *final* determination of the Commission under §1337 (d) or (e), may appeal such a determination to this court.

5. Issuance of protective orders is authorized by 19 C.F.R. 210.30(d). Under the terms of the protective order in this investigation, the confidential information could be disclosed only to designated persons and then solely for the purposes of the investigation.

Inasmuch as the Commission did not make a determination, as a result of an investigation, that there has, or has not been a violation and the imported article should, or should not, be excluded from entry into the United States (§1337(d)) and since the Commission did not make a determination that certain articles may be entitled to entry under a bond (§1337(e)), Ferro contends that appellant is without standing to bring the appeal and this court is without subject matter jurisdiction to hear the appeal.[6]

Ferro additionally argues that even if appellant had a right to an appellate review in this court, it nonetheless failed to file a notice of appeal within the alloted time period. Under the rules of this court,[7] Rule 4 of the Federal Rules of Appellate Procedure[8] provides sixty days in which to file a notice of appeal and such time is to be computed from the time of entry of the judgment or order appealed from. Ferro maintains that such "time of entry" occurred upon the occasion of the Administrative Law Judge's denial of the appellant's motion for reconsideration of the order denying the earlier motion to declassify rather than the subsequent denials by the whole Commission.

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6. Ferro cites *Import Motors, Inc. v. International Trade Commission*, 530 F.2d 937, 188 USPQ 491 (CCPA 1975) and *Rohm and Haas Company v. International Trade Commission*, 554 F.2d 462, 193 USPQ 693 (CCPA 1977) as support for this argument.

7. Rule 1.4(c) of this court states: "The Federal Rules of Appellate Procedure shall govern any practice or procedure not specifically covered by these rules."

8. Rule 4(a) (amended subsequent to the filing of this appeal) of the FRAP provides in pertinent part:

> (a) *Appeals in Civil Cases.* In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising

(Cont'd)

ITC's Motion to Dismiss

The ITC also filed a Motion to Dismiss arguing that the court lacks subject matter jurisdiction in this appeal. It notes that Congress has specifically provided for appellate review under §1337(c) only of "final determinations" under subjections [sic] (d) and (e) and impliedly under subsection (f).[9] Accordingly, it is argued, this court does not review "disputes of a collateral or interlocutory nature."[10]

(Cont'd)

> therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. * * *
>
> The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

9. See *Import Motors v I.T.C.*, supra.

10. We presume that the ITC means to argue that the court does not consider matters that are *only* collateral or completely unrelated to the final determination of the Commission. In an appeal, some review of material which may be ancillary to the final determination is necessary.

The ITC asserts that the Administrative Procedure Act (APA) similarly does not confer jurisdiction on this court over the issue in controversy in that §1337(c) incorporates only subchapter II, chapter 5, title 5 of the United States Code. That subchapter concerns only procedures internal to an agency. The judicial review provisions of the APA are contained in another non-included chapter, namely, chapter 7. In any event, the ITC argues that the Supreme Court has clearly stated that "the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action" in *Califano v. Sanders,* 430 U.S. 99, 107 (1977), so that even if this court had jurisdiction *under the APA* to hear an appeal regarding the final determination, it would not necessarily have the authority to hear petitions on interlocutory matters or other matters unrelated to that final determination absent a separate statutory grant.

The Commission maintains that the proper method of attaining Commission review of the Administrative Law Judge's denial of appellant's declassification petition is under the Freedom of Information Act (FOIA) (5 USC 552) and the *Rules of Practice and Procedure* before the Commission (19 C.F.R. 201 *et seq.*). It notes that appellant's request will be granted if the documents it seeks are not business confidential information within the meaning of 5 USC 552(b)(4).[11]

Appellant's Arguments

Appellant contends that the notice of appeal was timely filed in this matter. It is said that the 60 day period for appeal begins only after pursuit of all administrative remedies available

11. 5 USC 552(b)(4) provides, in essence, that an agency need not make available to the public information that consists of "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

to the appellant have been exhausted. Appellant argues that the Commission's rules (19 C.F.R. 210.56-60) provide for an appeal to the full Commission from the denial by the Administrative Law Judge to declassify the documents in issue.[12]

Appellant then reasons that the appeal need be filed only after the final refusal by the whole Commission to review the holding of the Administrative Law Judge.

Appellant additionally contends that §1337(c), by incorporating subchapter II of chapter 5 of the APA, allows a review under the APA of the hearing and the record by this court. Therefore, it is argued, since the APA provides that any "person suffering legal wrong because of agency action * * * is entitled to judicial relief thereof," this court is to grant such relief.[13]

Lastly, appellant argues that the FOIA is not appropriate in this case since the Protective Order itself (paragraph 13)[14] provided for an appeal from any ruling of the Commission.

12. Neither the Commission nor Ferro appears to agree that such an administrative avenue is open to appellant under the rules and, indeed, we are unable to verify the existence of such remedy by careful consideration of those rules. Nonetheless, the protective order itself may well provide for such a procedure. (*See* ftn. 14, infra.)

13. We note that §1337(c) incorporates *only* the provisions of subchapter II of chapter 5 of title 5 of the U.S. Code. The portion argued by appellant having to do with judicial review is in another chapter of the APA.

14. Paragraphs 8, 10 and 13 of the Protective Order provide:

> 8. The Commission, its designated presiding officer, and the Commission investigative attorney acknowledge that any document or information submitted as confidential business information pursuant to paragraph 2 above is to be treated as such within the meaning of 5 U.S.C. 552(b)(4)

(Cont'd)

OPINION

Section 1337(c) does not provide *this* court with the authority to review rulings and determinations of the ITC *under the APA* (see footnote 13, supra). Section 1337(c) does, however, grant this court the statutory authority to review "final

(Cont'd)

and 18 U.S.C. 1905, subject to a challenge by any party pursuant to paragraph 10 below or to a final ruling, after notice, by the Commission, its designated presiding officer, or its Freedom of Information Act Officer to the contrary, or by appeal of such a ruling, interlocutory or otherwise.

10. If a party to this order who is to be a recipient of any business information designated as confidential and submitted in accordance with paragraph 2, disagrees with respect to such a designation, in full or in part, it shall notify the supplier in writing, and they will thereupon confer as to the status of the subject information proffered within the context of this order. If prior to, or at the time of such a conference, the supplier withdraws its designation of such information as being subject to this order, but nonetheless submits such information for purposes of the investigation, such supplier shall express the withdrawal, in writing, and serve such withdrawal upon all parties and the Commission, its designated presiding officer, and the Commission investigative attorney. If the recipient and supplier are unable to concur upon the status of the subject information submitted as confidential business information, within ten days from the date of notification of such disagreement, any party to this order may raise the issue of the designation of such a status to the Commission or its designated presiding officer who shall consider the issue.

13. Nothing in this order shall abridge the right of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Commission, its Freedom of Information Act Officer, or its designated presiding officer concerning the issue of the status of confidential business information.

determination(s)" made under §1337(d), (e) and (f),[15] and other associated matters necessary for the proper consideration of those "final determinations."[16]

Without expressing any opinion on other points raised, this case may be disposed of on the basis of but a single question: Whether or not the matter in this appeal, i.e., the Commission's action concerning the Administrative Law Judge's refusal to declassify, is now or ever will be related to a "final determination" under the pertinent statute.

We note that the ITC terminated the investigation and dismissed the case against appellant — actions not challenged by appellant. It seems apparent that there is no "final determination" in this case within the meaning of the statute, nor will there ever be. The Commission will not, in this case, now direct that the tile setters be excluded or not excluded from entry into the United States. The Commission dismissed the action.

The keystone of our subject-matter jurisdiction in this case is simply missing. Without a "final determination," or even the possibility of one ever existing, this court is without authority to review the matters in question.

Accordingly, the appeal is *dismissed.*[17]

DISMISSED

15. A dismissal in an ITC proceeding without a finding is not a "final determination." See *Import Motors v. ITC*, supra at 944, 188 USPQ at 494.

16. Obviously the "All Writs Act" (28 USC 1651(a)) allows the court to issue writs necessary to preserve an issue in a lower tribunal for subsequent appeal *if* the court would have subject-matter jurisdiction over the issue in the first instance. *See Godfredsen v. Banner*, 598 F.2d 589, 202 USPQ 7 (CCPA 1979).

17. Appellant's motion to extend the time for filing the transcript is therefore moot.

APPENDIX II — RELEVANT STATUTES AND REGULATIONS

19 U.S.C. §1337

CHAPTER 4 — UNFAIR IMPORT PRACTICES

SEC. 341. AMENDMENT TO SECTION 337 OF THE TARIFF ACT OF 1930.

(a) Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) is amended to read as follows:

"SEC. 337. UNFAIR PRACTICES IN IMPORT TRADE.

"(a) UNFAIR METHODS OF COMPETITION DECLARED UNLAWFUL.—Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

"(b) INVESTIGATIONS OF VIOLATIONS BY COMMISSION; TIME LIMITS.—(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation. The Commission shall publish in

the Federal Register its reasons for designating any investigation as a more complicated investigation. For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

"(2) During the course of each investigation under this section, the Commission shall consult with, and seek advice and information from, the Department of Health, Education, and Welfare, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate.

"(3) Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that the matter may come within the purview of section 303 or of the Antidumping Act, 1921, it shall promptly notify the Secretary of the Treasury so that such action may be taken as is otherwise authorized by such section and such Act.

"(c) DETERMINATIONS; REVIEW.—The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5, United States Code. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d) or (e) may appeal such determination to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court.

"(d) EXCLUSION OF ARTICLES FROM ENTRY.—If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

"(e) EXCLUSION OF ARTICLES FROM ENTRY DURING INVESTIGATION EXCEPT UNDER BOND.—If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretay shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.

"(f) CEASE AND DESIST ORDERS.—In lieu of taking action under subsection (d) or (e), the Commission may issue

and cause to be served on any person violating this section, or believe to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless, after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued. The Commission may at any time, upon such notice and in such manner as it deems proper, modify or revoke any such order, and in the case of a revocation, may take action under subsection (d) or (e), as the case may be.

"(g) REFERRAL TO THE PRESIDENT.—(1) If the Commission determines that there is a violation of this section, or that, for purposes of subsection (e), there is reason to believe that there is such a violation, it shall—

"(A) publish such determination in the Federal Register, and

"(B) transmit to the President a copy of such determination and the action taken under subsection (d), (e), or (f), with respect thereto, together with the record upon which such determination is based.

"(2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) with respect thereto shall have no force or effect.

"(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c), be

effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), or (f) with respect thereto shall be effective as provided in such subsections, except that articles directed to be excluded from entry under subsection (d) or subject to a cease and desist order under subsection (f) shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary until such determination becomes final.

"(4) If the President does not disapprove such determination within such 60-day period, or if he notifies the Commission before the close of such period that he approves such determination, then, for purposes of paragraph (3) and subsection (c) such determination shall become final on the day after the close of such period or the day on which the President notifies the Commission of his approval, as the case may be.

"(h) PERIOD OF EFFECTIVENESS.—Except as provided in subsections (f) and (g), any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

"(i) IMPORTATIONS BY OR FOR THE UNITED STATES.—Any exclusion from entry or order under subsection (d), (e), or (f), in cases based on claims of United States letters patent, shall not apply to any articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government. Whenever any article would have been excluded from entry or would not have been entered pursuant to the provisions of such subsections but for the operation of this subsection, a patent owner adversely affected shall be entitled to reasonable and entire compensation in an action before the

Court of Claims pursuant to the procedures of section 1498 of title 28, United States Code.

"(j) DEFINITION OF UNITED STATES.—For purposes of this section and sections 338 and 340, the term 'United States' means the customs territory of the United States as defined in general headnote 2 of the Tariff Schedules of the United States."

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94–409, § 4(b), Sept. 13, 1976, 90 Stat. 1247.

THE AGENCIES GENERALLY

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential

source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E),(F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90–23, § 1, June 5, 1967, 81 Stat. 54; Pub.L. 93–502, §§ 1–3, Nov. 21, 1974, 88 Stat. 1561–1564; Pub.L. 94–409, § 5(b), Sept. 13, 1976, 90 Stat. 1247.

552a. Records maintained on individuals

(a) **Definitions.**—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(c) Accounting of Certain Disclosures.—Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solici-

tation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) **Agency rules.**—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) **Civil remedies.**—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(8)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records of any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000, and

(B) the costs of the action together with reasonable attorney fees be determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at

any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians.—For the purpose of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) **Criminal penalties.**—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) **General exemptions.**—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the

disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(*l*)(1) Archival records.—Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States

as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors.—When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(n) Mailing lists.—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(*o*) Report on new systems.—Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) Annual report.—The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(q) Effect of other laws.—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

Added Pub.L. 93–579, § 3, Dec. 31, 1974, 88 Stat. 1897, and amended Pub.L. 94–183, § 2(2), Dec. 31, 1975, 89 Stat. 1057.

552b. Open meetings

(a) For purposes of this section—

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an

action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made

available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together

with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the

United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other par-

ty who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(*l*) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

Added Pub.L. 94–409, § 3(a), Sept. 13, 1976, 90 Stat. 1241.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 384.

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 386; Pub.L. 94–409, § 4(c), Sept. 13, 1976, 90 Stat. 1247.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 387; Pub.L. 94–409, § 4(a), Sept. 13, 1976, 90 Stat. 1246.

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 388.

§ 559. Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5362, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to hearing examiners, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5362, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to hearing examiners, except to the extent that it does so expressly.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 388; Pub.L. 90–623, § 1(1), Oct. 22, 1968, 82 Stat. 1312.

19 C.F.R. §210.30(d)

(d) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which may appear necessary and appropriate for the protection of the public interest or which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the presiding officer;

(6) That a deposition, after being sealed, be opened only by order of the presiding officer;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

If the motion for a protective order is denied, in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

APPENDIX III — PROTECTIVE ORDER OF ITC ADMINISTRATIVE LAW JUDGE

U.S. INTERNATIONAL TRADE COMMISSION

Washington, D.C.

Received Feb. 14, 1978

Investigation No. 337-TA-41

In the Matter of

CERTAIN CERAMIC TILE SETTERS

WHEREAS, documents and information may be sought, produced or exhibited by and among the parties to the above captioned proceeding, which materials relate to trade secrets or other confidential research, development or commercial information, as such terms are used in the Commission's Rules, 19 C.F.R. Section 210.30(d)(7) (1976),

IT IS HEREBY ORDERED THAT:

1. Confidential business information is information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, the disclosure of which information is likely to have the effect of either (1) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or (2) causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.

2. Any information submitted, either voluntarily or pursuant to order, in this investigation, which is asserted by a supplier to contain or constitute confidential business information shall be so designated by such supplier in writing, or orally at a deposition, and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: "[supplier's name] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER," or a comparable notice. Such information shall be disclosed at any hearing only *in camera* before the Commission or the presiding officer.

3. In the absence of written permission from the supplier or an order by the Commission designated presiding officer, any confidential documents or business information submitted in accordance with the provisions of paragraph 2 above shall not be disclosed to any person other than: (i) outside counsel for parties to this investigation, including necessary secretarial and clerical personnel assisting such counsel; (ii) qualified persons taking testimony involving such documents or information and necessary stenographic and clerical personnel thereof; (iii) technical experts and their staff who are employed for the purposes of this litigation but who are not otherwise employed by, consultants to, or otherwise affiliated with a party, or who are not employees of any domestic or foreign manufacturer, wholesaler, retailer, or distributor of the certain ceramic tile setters which are the subject of this investigation; and (iv) the Commission, its designated presiding officer, the Commission staff, or personnel of any governmental agency as authorized by the Commission.

4. Confidential business information submitted in accordance with the provisions of paragraph 2 above shall not be made available to any person designated in paragraph 3(i) and (iii) unless they shall have first read this order and shall have agreed, in writing: (i) to be bound by the terms thereof; (ii) not

to reveal such confidential business information to anyone other than another person designated in paragraph 3; and (iii) to utilize such confidential business information solely for purposes of this investigation.

5. If the Commission orders, or if the supplier and all parties to the investigation agree, that access to, or dissemination of, information submitted as confidential business information shall be made to persons not included in paragraph 3 above, such matter shall only be accessible to, or disseminated to, such persons based upon the conditions pertaining to, and obligations arising from this order, and such persons shall be considered subject to it.

6. Any confidential business information, submitted to the Commission or its designated presiding officer in connection with a motion or other proceeding within the purview of this investigation shall be submitted under seal pursuant to paragraph 2 above. Any portion of a transcript in connection with this investigation containing any confidential business information submitted pursuant to paragraph 2 above shall be bound separately and filed under seal. When any confidential business information submitted in accordance with paragraph 2 above is included in an authorized transcript of a deposition or exhibits thereto, arrangements shall be made with the court reporter taking the deposition to bind such confidential portions and separately label them "[supplier's name], CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER." Before a court reporter receives any such information, he or she shall have first read this order and shall have agreed in writing to be bound by the terms thereof. Alternatively, he or she shall sign the agreement included as Attachment A hereto. Copies of each such signed agreement shall be provided to the supplier of such confidential business information and the Commission Secretary.

7. The restrictions upon, and obligations accruing to, persons who become subject to this order shall not apply to any information submitted in accordance with paragraph 2 above to which the person asserting the confidential status thereof agrees in writing, or the Commission or its designated presiding officer rules, after proper notice and hearing, was publicly known at the time it was supplied to the receiving party or has since become publicly known through no fault of the receiving party.

8. The Commission, its designated presiding officer, and the Commission investigative attorney acknowledge that any document or information submitted as confidential business information pursuant to paragraph 2 above is to be treated as such within the meaning of 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905, subject to a challenge by any party pursuant to paragraph 10 below or to a final ruling, after notice, by the Commission, its designated presiding officer, or its Freedom of Information Act Officer to the contrary, or by appeal of such a ruling, interlocutory or otherwise.

9. The Commission, its designated presiding officer, and the Commission investigative attorney shall take all necessary and proper steps to preserve the confidentiality of, and to protect each supplier's rights with respect to, any confidential business information designated by the supplier in accordance with paragraph 2 above, including, without limitation, (a) notifying the supplier promptly of: (i) any inquiry or request by anyone for the substance of or access of such confidential business information, other than those authorized pursuant to this order, under the Freedom of Information Act, as amended (5 U.S.C. 552), and (ii) any proposal to declassify or make public any such confidential business information; and (b) providing the supplier at least seven days after receipt of such inquiry or request within which to take action before the Commission, its Freedom of Information Act Officer, or its

designated presiding officer, or otherwise to preserve the confidentiality of and to protect its rights in, and to, such confidential business information.

10. If a party to this order who is to be a recipient of any business information designated as confidential and submitted in accordance with paragraph 2, disagrees with respect to such a designation, in full or in part, it shall notify the supplier in writing, and they will thereupon confer as to the status of the subject information proffered within the context of this order. If prior to, or at the time of such a conference, the supplier withdraws its designation of such information as being subject to this order, but nonetheless submits such information for purposes of the investigation, such supplier shall express the withdrawal, in writing, and serve such withdrawal upon all parties and the Commission, its designated presiding officer, and the Commission investigative attorney. If the receipient and supplier are unable to concur upon the status of the subject information submitted as confidential business information, within ten days from the date of notification of such disagreement, any party to this order may raise the issue of the designation of such a status to the Commission or its designated presiding officer who shall consider the issue.

11. No less than ten days prior to the initial disclosure of any confidential information submitted in accordance with paragraph 2 to a proposed expert, the party proposing to use such expert shall submit in writing the name of such proposed expert and his or her educational and employment history to the supplier. If the supplier objects to the disclosure of such confidential business information to such proposed expert as inconsistent with the language or intent of this order or on other grounds, it shall notify the recipient in writing of its objection and the grounds therefor, and if the dispute is not resolved on an informal basis, the supplier within ten days of receipt of such notice of objections shall submit each objection to the

Commission or its designated presiding officer for a ruling and the submission of such confidential business information to such proposed expert shall be withheld pending the ruling of the Commission or its designated presiding officer. The terms of this paragraph shall be inapplicable to experts within the Commission or to experts from other governmental agencies who are consulted with or used by the Commission.

12. If confidential business information submitted in accordance with paragraph 2 is disclosed to any person other than in the manner authorized by this protective order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the supplier and the designated presiding officer and, without prejudice to other rights and remedies of the supplier, make every effort to prevent further disclosure by it or by the person who was the receipient of such information.

13. Nothing in this order shall abridge the right of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Commission, its Freedom of Information Act Officer, or its designated presiding officer concerning the issue of the status of confidential business information.

14. Upon final termination of this investigation, each party that is subject to this order shall assemble and return to the supplier all items containing confidential business information submitted in accordance with paragraph 2 above, including all copies of such matter which may have been made, but not including copies containing notes or other attorney's work product that may have been placed thereon by counsel for the receiving party. All copies containing notes or other attorney's work product shall be destroyed. Receipt of material returned to the supplier shall be acknowledged in writing. This paragraph shall not apply to the Commission, including its presiding officer

and its investigative attorney, which shall retain such material pursuant to statutory requirements and for other recordkeeping purposes, but may destroy those additional copies in its possession which it regards as surplusage.

15. If any confidential business information, which is submitted in accordance with paragraph 2 above, is supplied by a nonparty to this investigation, such a nonparty shall be considered a "supplier" within the meaning of that term as it is used in the context of this order.

16. The Secretary shall serve a copy of this Order upon all parties of record.

s/ Donald K. Duvall
Judge Donald K. Duvall
Presiding Officer

Issued February 10, 1978

Attachment A

NONDISCLOSURE AGREEMENT FOR REPORTER/STENOGRAPHER

I, _____do solemnly swear (or affirm) that I will not divulge any information communicated during any *in camera* portion of a proceeding conducted in the course of investigation 337-TA-41 CERTAIN CERAMIC TILE SETTERS to any person for any purpose, other than that directly associated with my official duties. Neither will I directly or indirectly use, or allow the use of such information for any purpose other than that directly associated with my official duties.

Further, I will not by direct action, discussion, recommendation, or suggestion to any person reveal the nature or content of any information communicated during any *in camera* portion of a proceeding conducted in the course of said investigation.

I also affirm that I do not hold any position or official relationship with, own any stocks or bonds of, or have any pecuniary interest in any of the participants in said investigation.

I am aware that the unauthorized use or conveyance of information as specified above is a violation of the Federal Criminal Code, and is punishable by a fine of up to $10,000, imprisonment of up to ten (10) years, or both.

Signed_____

Dated _____

Firm or Affiliation_____
_____
_____

Appendix III - Protective Order

CERTAIN CERAMIC TILE SETTERS 337-TA-41

Certificate of Service

I, Kenneth R. Mason, hereby certify that the attached Protective Order was served upon Edward M. Lebow, Esq., and upon the following parties, and counsel of record via first class mail on February , 1978.

s/ Kenneth R. Mason
Kenneth R. Mason, Secretary
U.S. International
Trade Commission
701 E Street, N.W. 20436

(For Complainant Ferro Corp.)

Harvey Kaye, Esq.
Spencer & Kaye
1920 L Street, N.W.
Washington, D.C. 20036
Counsel for complainant

Respondents

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Ceramica Regiomontana, S.A.
Apdo. Postal 1269
Monterrey, N.L., Mexico

Refractarios Monterrey, S.A.
Apdo. Postal 2691
Monterrey, N.L., Mexico

Supreme Court, U.S.
FILED
FEB 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1070

In the Supreme Court of the United States

OCTOBER TERM, 1979

REFRACTARIOS MONTERREY, S.A., PETITIONER

v.

FERRO CORPORATION AND U.S. INTERNATIONAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES INTERNATIONAL TRADE COMMISSION IN OPPOSITION

WADE H. McCREE, JR.
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OPINION BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 1a-13a) is reported at 606 F. 2d 966.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on October 11, 1979. The petition for a writ of certiorari was filed on January 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the Court of Customs and Patent Appeals had jurisdiction of an appeal from the refusal of the International Trade Commission to review, following termination of the underlying investigation, the decision of its administrative law judge not to release certain discovery materials classified as confidential business information subject to protective order.

STATEMENT

1. Section 337(a) of the Tariff Act of 1930, 19 U.S.C. 1337(a), prohibits "[u]nfair methods of competition and unfair acts" in the import trade when the effect or tendency of such methods or acts is to destroy or substantially injure an efficiently and economically operated United States industry. The International Trade Commission is empowered to investigate alleged violations of Section 337. If the Commission determines that a violation of the statute has occurred, it may exclude the article in question from importation into the United States (19 U.S.C. 1337(d)) or issue a cease-and-desist order (19 U.S.C. 1337(f)). In addition, the Commission has authority to exclude articles during the course of an investigation in cases where it determines that there is "reason to believe" that the statute has been violated (19 U.S.C. 1337(e)). Persons "adversely affected by a final determination of the Commission under subsection (d), (e), or (f) may appeal such determination to" the Court of Customs and Patent Appeals ("CCPA"). 19 U.S.C. 1337(c).[1]

[1]Section 337 was amended on July 26, 1979, by Section 1105(c) of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 311. The text of Section 337 set out in the appendix to the petition (Pet. App. 15a) does not reflect these amendments. Prior to enactment of the Trade Agreements Act, Section 337(c) provided for CCPA review of final Commission determinations to prohibit importation under Subsections (d) and (e), but did not refer to review of cease-and-desist orders issued under the authority of Subsection (f).

2. On the basis of a complaint filed by respondent Ferro Corporation ("Ferro") pursuant to Section 337, the Commission on February 3, 1978, instituted an investigation of alleged unfair methods of competition and unfair acts in the importation and sale of certain ceramic tile setters (Pet. App. 2a-4a).[2] The Commission's notice of investigation listed six unfair acts or methods of competition allegedly committed by petitioner and two other firms named in the Commission's investigation (*id.* at 4a-5a).

On September 11, 1978, the Commission terminated the tile setters investigation on the ground that none of the six unfair acts and unfair methods of competition enumerated in its notice of investigation remained to be adjudicated (Pet. App. 6a). The Commission observed that Ferro had failed in its prehearing statement to set forth in detail, and was thus deemed to have abandoned or withdrawn, any alleged unfair acts and unfair methods of competition other than that of patent infringement (*id.* at 5a). The Commission also observed that Ferro had filed a disclaimer with the Patent and Trademark Office pursuant to 35 U.S.C. 253, thereby effectively removing patent infringement as an issue in the investigation (*id.* at 5a-6a).

Approximately one month prior to termination of the investigation, petitioner filed a motion with the presiding administrative law judge of the Commission ("ALJ")

[2]Tile setters are box-shaped devices used to support flat ceramic tiles during firing in a kiln (Pet. App. 4a).

seeking the declassification of certain depositions and exhibits thereto (Pet. App. 6a). During discovery, these materials had been classified as confidential commercial information subject to a protective order (*id.* at 6a-7a). After Ferro and petitioner were able to agree upon the declassification of a portion of the materials in controversy, petitioner on September 1 filed a supplemental motion to declassify the remaining documents (Pet. 4; Pet. App. 7a).

On September 27, 1978, the ALJ issued an order denying petitioner's motions to declassify (Pet. App. 7a). On October 6, 1978, petitioner filed a motion for reconsideration, which the ALJ denied on January 12, 1979 (*ibid.*). On January 24, 1979, petitioner filed with the Secretary of the Commission a document denominated "Appeal of Order of Presiding Officer Denying Motion to Declassify" (*ibid.*). On March 6, 1979, the Commission advised petitioner of its decision "not to review the [ALJ's] order * * * denying [the] motion to declassify" and informed petitioner of its recourse to seek release of the disputed materials under the Freedom of Information Act (*ibid.*). Petitioner's subsequent "Petition for Reconsideration" of the Commission's decision was denied, and petitioner was again apprised of its right to request disclosure under the FOIA (*ibid.*).

3. On May 10, 1979, petitioner filed a notice of appeal to the CCPA seeking review only of the Commission's refusal to review the ALJ's order denying release of the confidential discovery documents. No review was sought of the Commission order that terminated the tile setters investigation (Pet. App. 7a). On October 11, 1979, the CCPA dismissed the appeal for lack of jurisdiction, holding that the Commission's action was not a " 'final determination' * * * within the meaning of" 19 U.S.C. 1337(c) (Pet. App. 13a).

ARGUMENT

1. 19 U.S.C. 1337(c) empowers the CCPA to review "final determination[s] of the Commission under subsection (d), (e), or (f)." In turn, Subsections (d), (e), and (f) pertain to orders of exclusion from importation and cease-and-desist orders. Hence, the Commission's refusal to consider the ALJ's ruling on access to discovery materials, in light of the termination of the underlying investigation, is not encompassed within the CCPA's appellate jurisdiction under Section 337(c). As the CCPA concluded (Pet. App. 13a):

> We note that the ITC terminated the investigation and dismissed the case against appellant—actions not challenged by appellant. It seems apparent that there is no "final determination" in this case within the meaning of the statute, nor will there ever be. The Commission will not, in this case, now direct that the tile setters be excluded or not excluded from entry into the United States. The Commission dismissed the action.
>
> The keystone of our subject-matter jurisdiction in this case is simply missing. Without a "final determination," or even the possibility of one ever existing, this court is without authority to review the matters in question.

See also *Import Motors Limited, Inc.* v. *U.S. International Trade Commission*, 530 F. 2d 940, 944 (CCPA 1976) ("that phrase [final determination of the Commission under subsection (d) or (e)] refers to a final

administrative decision on the merits, excluding or refusing to exclude articles from entry under subsection (d) or (e)" (footnote omitted)).[3]

Nor, contrary to petitioner's suggestion (Pet. 11-13), did the CCPA have jurisdiction by virtue of the provision in 19 U.S.C. 1337(c) that "[e]ach determination [by the Commission] under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5 [Administrative Procedure Act (APA), 5 U.S.C. 551-559]." The provisions of the APA incorporated by reference in Section 337(c) pertain to the administrative procedures employed by the agency and do not bear on the issue of judicial review (Pet. App. 11a n.13). Moreover, even those sections of the APA that deal with judicial review (5 U.S.C. 701-706) do not confer jurisdiction on the federal courts. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

---

[3]Petitioner contends (Pet. 10-11) that the decision below is inconsistent with *Import Motors*. The CCPA correctly rejected this contention that its own decisions were in conflict (Pet. App. 13a n.15). In *Import Motors*, the CCPA dismissed for want of jurisdiction an appeal to review a nonfinal ALJ order discontinuing the participation of certain companies at the initial stage of a proceeding without prejudice to their subsequent intervention. The court also noted (530 F. 2d at 944 n.9) that a final Commission determination under Subsection (f) would be subject to review even though Section 337(c) referred at that time only to Subsections (d) and (e); in the court's view, the failure to include Subsection (f) was the result of "legislative inadvertence." (As discussed above, Section 337(c) has now been amended expressly to apply to final Commission determinations under Subsection (f).) *Import Motors* is of no assistance to petitioner, for that decision did not dispense with the jurisdictional requirement that there be a final Commission determination under Subsection (d), (e), or (f), a requirement that petitioner fails to satisfy.

2. The ALJ and the Commission acted upon petitioner's declassification request after the investigation in this case had been dismissed. Nevertheless, petitioner has persisted in seeking to invoke the processes applicable to a Commission investigation in order to gain access to discovery materials produced during the terminated proceeding.

As the Commission has repeatedly advised it, however, petitioner's proper recourse would be to pursue its remedies under the Freedom of Information Act, 5 U.S.C. 552.[4] The Court recognized in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975), that a requester's "rights under the [FOIA] are * * * [not] decreased by reason of the fact that it claims an interest in the * * * [requested documents] greater than that shared by the average member of the public." Moreover, a request under the FOIA would not "be extremely burdensome and repetitive" (Pet. 8), and would clearly be less onerous than petitioner's chosen course of moving for reconsideration before the ALJ, twice petitioning the Commission, appealing to the CCPA, and filing for a writ of certiorari in this Court. Finally, in the event its FOIA request is denied, petitioner would be entitled to *de novo* review in the district court (5 U.S.C. 552(a)(4)(B)) with a right of appeal to the appropriate court of appeals.

---

[4]The CCPA noted (Pet. App. 10a) the Commission's representation that a request by petitioner under the FOIA "will be granted if the documents it seeks are not business confidential information within the meaning of 5 U.S.C. 552(b)(4)." The ALJ's protective order also stated (Pet. App. 11a-12a n.14) that confidential treatment would be afforded "subject to * * * final ruling, after notice, by * * * [the Commission's] Freedom of Information Act Officer to the contrary * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FERRO CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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QUESTION PRESENTED

The real issue here is restated below for the reason that, as drafted and characterized by Petitioner, it is so broad as to fail to apprise this Court of what the controversy is really all about at this stage.

The essence of the issue is:

> In a situation wherein the ITC terminates an investigation essentially in favor of the respondent

therein, without ever having made a final determination either for, or against, either party, does the United States Court of Customs and Patent Appeals have jurisdiction to entertain an appeal of procedural questions relating to the incomplete, ITC investigation?

In other words, stated as the civil equivalent:

Does a defendant, who has had plaintiff's complaint dismissed by the trial court, have a right to then appeal secondary interlocutory matters, particularly when defendant is left no worse off thereby than he was prior to suit?

ARGUMENT

§ 337(c) of the Tariff Act of 1930 (19 USC 1337) is the principal governing section and is reproduced at this point.

"(c) DETERMINATIONS; REVIEW.—The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5, United States Code. All legal and equitable defenses may be presented in all cases. Any person *adversely affected by a final determination of the Commission* under subsection (d) or (e) may appeal *such determination* to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court."

(Emphasis supplied)

The above section, which confers limited jurisdiction on the U.S. Court of Customs and Patent Appeals, unambiguously requires that two conditions be met before the CCPA may assume jurisdiction, and those are:

1. That a person (CCPA appellant) must be *adversely affected,* and
2. That a person must have been adversely affected by a *final determination* of the ITC under subsections (d) or (e) of the Act.

As the CCPA stated in its opinion appealed from (Page 13a, Appendix of the Petition herein):

"We note that the ITC terminated the investigation and dismissed the case against appellant (Petitioner herein)—actions not challenged by appellant."

Therefore, since it is undisputed that the investigation was terminated by the ITC prior to a final determination, in effect dismissing Petitioner herein as a respondent, such dismissal could hardly have "adversely affected" Petitioner. And since it is undisputed that such termination prevented the ITC from ever making a final determination as required by the Act, on the face of it, and really not even subject to challenge by Petitioner, it had no basis for seeking to invoke the jurisdiction of the CCPA.

SUMMARY OF §§ 337(d) and (e)

Simply to complete respondent's argument against the grant of the writ requested, § (d) of the Act, reproduced in the Appendix hereof, provides for exclusion of articles from entry *if* the ITC made an appro-

priate final determination against an ITC respondent; § (e), upon a similar determination, provides for exclusion of articles from entry during an investigation except under bond.

No determination under either (d) or (e) was ever made by the ITC in its investigation, no exclusion order of any kind was ever entered against Petitioner, and, as stated by the CCPA in its decision appealed from (Page 13a, Petitioner's Appendix):

> "It seems apparent that there is no 'final determination' in this case within the meaning of the statute, nor will there ever be. The Commission will not, in this case, now direct that the tile setters be excluded or not excluded from entry into the United States. The Commission dismissed the action."

CONCLUSION

The governing statute is clear, unequivocal and unambiguous. Under its plain terms, and in accordance with its own prior, earlier decision, the CCPA correctly granted Ferro's motion to dismiss Refractarios' appeal, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

19 U.S.C. § 1337

"(d) EXCLUSION OF ARTICLES FROM ENTRY.—If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

"(e) EXCLUSION OF ARTICLES FROM ENTRY DURING INVESTIGATION EXCEPT UNDER BOND.—If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.